[APPELLATE CIVIL JURISDICTION]

AITKEN, J.

February 12, 1938.

LENG LAN (F) - Plaintiff-Appellant.

v.

S. M. YESUDIAN - Defendant-Respondent.

(PERAK MAGISTRATE'S CIVIL APPEAL No. 30 of 1937)

Civil Procedure Code (Cap. 7) Section 188—Scope of.

The Plaintiff-Appellant sued the Defendant-Respondent in the Magistrate's Court for money lent. After recording evidence from the Plaintiff and his witnesses and from the Defendant and his witnesses the Magistrate reserved his decision. A day or two after the Magistrate had reserved his judgment the Defendant told his counsel that there was a certain Chinese who could have given very material evidence on his behalf had he been called. Thereupon counsel drew up an affidavit for the defendant to affirm which concluded with a request for the Court to exercise its power under section 188 of the Civil Procedure Code to call the said Chinese to give evidence.

Held, that the scope of section 188 is very limited and only applies when the Court, from the evidence adduced by the parties, comes to the conclusion that there is a person mentioned in that evidence who could, were he called as a witness, give really material evidence on one or more of the issues of fact raised during the trial.

MAGISTRATE'S CIVIL APPEAL.

S. Seenivasagam for the Appellant.

J. L. Woods for Respondent.

Aitken, J.—After setting out the facts and dealing with the evidence His Lordship said:—

Section 188 of the Civil Procedure Code reads as follows:—

> "Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person, other than a party to the suit, who is not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document."

To my mind the scope of this section is very limited, and only applies when the Court, from the evidence adduced by the parties, comes to the conclusion that there is a person mentioned in that evidence who could, were he called as a witness, give really material evidence on one or more of the issues of fact raised during the trial. In such a case the presiding Judge or Magistrate, acting under and in accordance with this section, may call that witness at the trial and not after; and in doing so he must bear in mind that the witness he calls is liable to be cross-examined by any of the parties to the suit. Thus, if one of the parties to the suit objects to any person being called as a witness by the Court, the presiding Judge or Magistrate should not exercise his powers under this section 188 unless he is satisfied that his evidence is necessary to enable him to do justice between the parties: see the English case of *In re Enoch and Zaretzky, Bock & Co's. Arbitration* (1910) 1 K.B. 327. In this particular case it is almost a labour of supererogation to point out that Ng Pai's name was never mentioned in the evidence adduced before the learned Magistrate, and that the latter cannot possibly have considered his evidence as in any way necessary to enable him to arrive at a correct decision.

When a party to a law suit discovers, or bethinks himself of fresh evidence after the hearing is complete, he cannot properly do anything about it until judgment is delivered. Then, if judgment is in his favour, there is obviously no need for him to do anything about it. If judgment is against him, he may apply to the Court for a review of the decree passed or order made under section 579 of the Civil Procedure Code, or he may appeal against the judgment and seek to persuade the Appeal Court to allow him to call additional evidence pursuant to section 558 of the Civil Procedure Code. In either case he will have to satisfy the Court that the additional evidence he desires to adduce was not within his knowledge, or could not be produced by him at the trial, in spite of the exercise of due diligence on his part. When once the hearing of a case is complete, the Courts are very unwilling to allow the same to be re-opened for the purpose of hearing new evidence except for good and substantial cause. *Order accordingly.*

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.A.

May 26, 1939.

In the Matter of the Estate of Yong Nee Chai, deceased.

YONG JOO LIN AND OTHERS

vs.

LAM TAIP NYONG AND OTHERS

(SELANGOR ORIGINATING SUMMONS No. 134 of 1938)

Courts Enactment, (Cap. 2) S. 49 (i) (a).—Jurisdiction to make representation Orders.